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No. 10-

IN THE
# Supreme Court of the United States

JUAN CARLOS ASTELLO,

*Petitioner,*

v.

JOHN FAYRAM, Warden,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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August 11, 2010

## QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in denying Astello's Petition for Panel Rehearing and the district court abused its discretion in summarily dismissing *sua sponte* Astello's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 due to an alleged violation of the one year time limitation period pursuant to 28 U.S.C. 2244(d)(1)(A) without considering the petition on the merits or eliciting an Answer from Respondent.

II. Whether the State of Iowa had territorial jurisdiction to charge Astello with first-degree murder when the murder occurred in the State of Minnesota which is outside the territorial bounds of Iowa.

III. Whether in light of *Graham v. Florida*, 560 U. S. ____(2010), Astello's judgment must be reversed and his case remanded for further proceedings.

## PARTIES TO THE PROCEEDING

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## OPINIONS BELOW

The Judgment Decision (Appendix 1a) and Order Denying Petition for Panel Rehearing (Appendix 17a) of the U. S. Court of Appeals for the Eighth Circuit is unpublished. The U. S. District Court Preliminary Review (Appendix 6a) and Judgment (Appendix 16a) are also unpublished.

## BASIS FOR JURISDICTION

On January 13, 2010, the U. S. District Court entered a Judgment in a Civil Case denying Petitioner's writ of habeas corpus pursuant to 28 U.S.C. § 2254. One April 21, 2010, the U. S. Court of Appeals for the Eighth Circuit issued a Judgment Decision denying Petitioner's certificate of appealability and dismissed Petitioner's appeal. On May 21, 2010, the U. S. Court of Appeals for the Eighth Circuit issued an Order denying Petitioner's Petition for Panel Rehearing. Jurisdiction of this Court is provided by 28 U.S.C. Sec.1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Suspension Clause of the Constitution, Article I § 9, cl 2– The U.S. Constitution, Art. I, § 9, cl. 2, permits suspension of the privilege of writ of habeas corpus in limited circumstances:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Eighth Amendment–

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Iowa Code sections 707.1 and 707.2(1)(2005)–

> Iowa Code section 707.1 provides:
> "A person who kills another person with malice aforethought either express or implied commits murder."
>
> Section 707.2(1) provides:
> "A person commits murder in the first degree when the person commits murder under any of the following circumstances: (1) The person willfully, deliberately, and with premeditation kills another person."

Iowa Code section 803.1(1)(a)(2007)–

> 1. A person is subject to prosecution in this state for an offense which the person commits within or outside of this state, by the person"s own conduct or that of another for which the person is accountable, if:(a) The offense is committed either wholly or partly within this state. . .
>
> 2. An offense may be committed partly within this state if *conduct which is an element of the offense or a result of which constitutes an element of the offense* occurs within this state. .

28 U.S.C. Sec.1254(1)–Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; and (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2244(d)–(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

28 U.S.C. § 2254–(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 59(e) of the Federal Rules of Civil Procedure– MOTION TO ALTER OR AMEND A JUDGMENT.

> A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 4 of the Rules Governing 28 U.S.C. § 2254 Proceedings–

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise, the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

## STATEMENT OF THE CASE

### A. The Proceedings Below

Following his 1998 trial in the Iowa District Court in and for Kossuth County, Iowa, a jury found Astello guilty of second-degree murder, first-degree kidnaping, and conspiracy to commit a forcible felony for his participation in the kidnaping and fatal shooting of

Erickson. See *State v. Astello*, No. FECR006374 (Kossuth County Dist. Ct.).

On April 13, 1998, Astello was sentenced to an indeterminate 50-year term of imprisonment for second-degree murder and a life sentence without the possibility of parole for first-degree kidnaping. *Id.* The conspiracy count was dismissed. *Id.* Astello filed a Notice of Appeal on April 20, 1998. *Id.* His appeal was referred to the Iowa Court of Appeals.

The Iowa Court of Appeals affirmed Astello's convictions on August 27, 1999, and the Iowa Supreme Court denied his application for further review.

On September 27, 2001, Astello applied for postconviction relief in the Kossuth County District Court. See *Astello v. State*, No. PCCV024292 (Kossuth County Dist. Ct. 2002). Following a hearing, the postconviction court rejected all of Astello's claims and denied his request for postconviction relief on November 26, 2002. *Id.* Astello appealed. On February 11, 2004, the Iowa Court of Appeals affirmed. See *Astello v. State*, 680 N.W.2d 378 (Iowa Court App. 2004). On May 28, 2004, the Iowa Supreme Court denied further review.

On November 27, 2006, Astello applied for postconviction relief See *Astello v. State*, No. PCCV025276 Kossuth County Dist. Ct. 2007), appeal dismissed, No. 07-1462 (Iowa 2008).

On August 7, 2007, the Kossuth County District Court dismissed his petition for postconviction relief, and Astello appealed. *Id.* On August 22, 2008, the appeal was dismissed.

On June 23, 2009, Astello filed the instant 28 U. S. C. § 2254 Petition for Writ of Habeas Corpus ("§ 2254 Petition").(Doc. 1).

On January 13, 2010, the lower court entered a Preliminary Review (Doc. 4) claiming that he was procedurally and time barred and Judgment denying Astello's § 2254 Petition (Doc. 6).[1]

On February 2, 2010, Astello filed a COA in the court below (Doc. 7).

On February 12, 2010, Astello timely filed a Notice of Appeal (Doc. 8).

On February 16, 2010, the district court denied Astello's COA.(Doc.9).

**B. The Factual Background**

According to the State's evidence, Luis Lua ("Lua") and others assaulted and abducted Gregory Erickson ("Erickson") in Spencer, Iowa on June 6, 1997. Although not present at the time Erickson was abducted, Astello allegedly joined Lua and others later that evening in Esterville, Iowa. Astello was allegedly seen leaving Lua's Esterville residence with Erickson and Ramiro Astello (Astello's older brother). This group met Ryan Wedebrand and Thomas Mann at a rural Iowa park where Erickson was allegedly bound, gagged and repeatedly beaten by the group. Erickson was then transported to an abandoned Minnesota farmstead where he was shot to death by

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[1] "Doc" refers to the U.S. District Court for the Northern District of Iowa (Western Division) Docket Report in 5:09-cv-04052-DEO which is immediately followed by the entry Number.

Lua. The State of Minnesota found the body and sent their own crime scene investigators to collect the evidence and photograph the area and do the autopsy.

Astello was charged with first-degree murder, first-degree kidnaping, conspiracy to commit a forcible felony and criminal gang participation in the death of Erickson.[2]

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[2] Astello was initially charged in the Federal system, but the charges were dismissed against him for lack of evidence. Initially, the State of Iowa did not charge Astello with first degree murder. The Federal prosecutor filed the murder charges on Lua who later pled guilty to that charge. Lua is serving a Life Sentence in the Federal system. Lua took complete responsibility for the murder and stated in his Acceptance of Responsibility Statement that "no one else knew it was going to happen." Further, at the time of the crime, Astello was only 16-years old and had just been released from the hospital after suffering a mild concussion and being in a coma for a few days after being severely beaten by others in the community where he lived. He sought protection from his older brother Ramiro. He was afraid. He spoke very little English, he did not want to be involved in the conduct of the others and wanted to leave the scene of the crimes before they occurred. He did not have the ability or capability of fighting all the people present to defend Erickson because there were four (4) others in the car. He was unable to secure a ride from the scene because he was far out in the countryside and he was not familiar with the area.

## ARGUMENT

**I. The U. S. Court of Appeals for the Eighth erred in denying Astello's Petition for Panel Rehearing and the district court abused its discretion in summarily dismissing *sua sponte* Astello's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 due to an alleged violation of the one year time limitation period pursuant to 28 U.S.C. 2244(d)(1)(A) without considering the petition on the merits or eliciting an Answer from Respondent.**

In its Preliminary Review (Doc.4), the district court spends considerable time explaining the meaning of Rule 4 of the Rules Governing Section 2254 cases and explaining why Astello's Writ of Habeas Corpus under 28 U.S.C. § 2254 is time barred and must therefore be dismissed. The lower court passed over the issues entirely and made absolutely no effort to rule on the merits of Astello's § 2254 Writ.

Rule 4 expressly provides that the court shall conduct an initial review of the petition for habeas corpus and summarily dismiss it, order a response, or "take such action as the judge deems appropriate." See Rule 4, Rules Governing Section 2254 Cases. The court may summarily dismiss an application without ordering a response if it plainly appears from the face of the application and its exhibits that the petitioner **is not entitled to relief**. Rule 4 does **not** state that the court may raise *sua sponte* the time bar limitations under 28 U.S.C. § 2244 and summarily dismiss the Writ.

Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses. See *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653-56 (4th Cir. 2006).

No circuit court has directly addressed whether it is appropriate to *sua sponte* enforce the time limitations of Rule 4. When considering Rule 4 and other claim-processing rules, courts have generally just proceeded to the merits of the case after the determining the party forfeited its timeliness objection. See *Huerta v. Gonzales*, 443 F.3d 753, 756-57 (10th Cir. 2006) (holding the Board of Immigration Appeals regulations governing_appeals are claim-processing rules and proceeding to the merits after determining the government had forfeited its timeliness objection); *First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir. 2006) (raising the timeliness of the defendant's 59(e) motion *sua sponte*, but proceeding summarily to the merits after determining Rule 59(e) is claim-processing and the plaintiff forfeited its objection).

In general, a statute of limitations may not be raised *sua sponte* and all circuits to consider this issue have held so explicitly. *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653-56 (4th Cir. 2006); *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988); *Davis v. Bryan*, 810 F.2d 42, 45 (2d Cir. 1987); *Wagner v. Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962). Statutes of limitations have traditionally been construed as benefitting the litigants, not the court. For example, "'[s]tatutes of limitations are primarily

designed to assure fairness to defendants.'" *Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1058 (10th Cir. 2006) (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)). Statutes of limitations "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* (quoting *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

In this case, it certainly cannot be said that there was an adversarial system of justice. The closest that the court below came to addressing Astello's issues was when the judge momentarily spent a paragraph listing Astello's claims. In essence, Astello never had a chance and the Respondent never had to defend itself. The district court failed to sufficiently state specific findings of fact and conclusions of law in summarily dismissing Astello's § 2254 Writ. In denying section 2254 Writs, district courts should specifically enumerate the issues raised by the prisoner and explain the reasons for their rulings. Such findings and conclusions are "plainly indispensable to appellate review." *United States v. Flores,* 135 F. 3d 1000 (5th Cir. 1998).

Under *Schlup v. Delo,* a habeas petitioner can overcome a state procedural bar to relief by making a "gateway" showing of "actual innocence." 513 U.S. 298, 316 (1995). However, it is an open question whether a showing of actual innocence can similarly excuse a failure to comply with AEDPA's one-year statute of limitations. If Astello can make an adequate showing of "actual innocence" under the *Schlup* standard, he should be allowed to go forward and the one-year

statute of limitations should be set-aside. The point of the actual innocence inquiry is for the federal habeas court to satisfy itself that it should suspend the normal procedural default rule, disregard the important judicial interests of finality and comity, and allow a state prisoner to present his defaulted constitutional claims to a federal court. See *McCleskey v. Zant*, 499 U.S. 467, 490-491(1991). See also, *Herrera v. Collins*, 506 U.S. 390, 404 (1993)(stating that a procedural claim of actual innocence constitutes "a gateway through which a habeas petitioner must pass to have [his] otherwise [time] barred constitutional claim considered on the merits").

In *Veal v. State,* No. 08-1207,(February 26, 2010), the Iowa Supreme Court reversed and remanded to the district court. In doing so, the Iowa Court relied on its precedent holding in *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009). In *Bruegger*, the Iowa Court considered whether a challenge to a sentence under the Cruel and Unusual Punishment Clauses of the United States and Iowa Constitutions was a challenge to an "illegal sentence" under Iowa Rule of Criminal Procedure 2.24(5)(*a*). The Iowa Court held in *Bruegger* that a cruel-and-unusual-punishment challenge amounted to a claim that a sentence was illegal because it involved a claim that the sentencing court lacked the power to impose a particular sentence. *Bruegger*, 773 N.W.2d at 871. As such, Veal's claim did not constitute a postconviction relief action, so her case was not governed by the postconviction statute of limitations. Similarly, in this case, Astello's sentence is also illegal based on the recent decision by this Court in *Graham v. Florida,* 560 U. S. ____ (2010) briefed below. In *Veal*, the Iowa Supreme Court ruled

that the time limitation statute does not apply and is not applicable to claims involving illegal sentences. Accordingly, Astello should not have been time-barred by the district court and his case should be **reversed** and **remanded**,

Moreover, in the light of Astello's claimed jurisdictional infirmity below, the application of AEDPA's time bar would amount to an unconstitutional violation of the Suspension Clause of the Constitution, Article I § 9, cl. 2. The fact that Iowa did not have territorial jurisdiction to indict and try Astello must trump any procedural time bar element. Astello has a valid actual innocence claim of the first-degree murder charge and his conviction should be **Reversed** and **Remanded**.

## II. The State of Iowa did not have territorial jurisdiction to charge Astello with first-degree murder when the murder occurred in the State of Minnesota which is outside the territorial bounds of Iowa.

Under Iowa Code section 803.1(1)(a) (2007), a person is subject to prosecution in Iowa for an offense committed wholly or partly within the state. To ascertain whether territorial jurisdiction exists in Iowa, the court must examine the facts of the case "to determine whether conduct or a result of conduct constituting an element of the crime . . . took place in Iowa." *State v. Wagner*, 596 N.W.2d 83, 86 (Iowa 1999).

In *State v. Serrato*, 772 N.W.2d 16, 2009 Iowa App. LEXIS 1162 (Iowa Ct. App., 2009), Victor Serrato appealed his convictions of first-degree murder in violation of Iowa Code sections 707.1 and 707.2(1)

(2005), and nonconsensual termination of a human pregnancy in violation of section 707.8(4). Serrato's core argument was that the State failed to establish the requisite territorial jurisdiction to prosecute him in Iowa. The Iowa Appeals Court agreed that the State did not establish the requisite territorial jurisdiction to prosecute him in Iowa as a matter of law and Reversed and Remanded for dismissal.

"Generally, jurisdiction necessary to prosecute a public offense rests in the courts of the state where the offense was committed." *State v. Liggins*, 524 N.W.2d 181, 184 (Iowa 1994)). Iowa's criminal jurisdiction statute, patterned in part upon the Model Penal Code, is codified in Iowa Code section 803.1. which provides, in relevant part:

> 1. A person is subject to prosecution in this state for an offense which the person commits within or outside of this state, by the person's own conduct or that of another for which the person is accountable, if:
>
> > (a) The offense is committed either wholly or partly within this state. . . .
>
> 2. An offense may be committed partly within this state if *conduct which is an element of the offense or a result of which constitutes an element of the offense* occurs within this state. . . Iowa Code § 803.1 (emphasis added). To ascertain whether territorial jurisdiction exists in Iowa, the court must examine the facts of the case "to
>
> termine whether conduct or a result of
> nduct constituting an element of the crime

> . . . took place in Iowa." *Wagner*, 596 N.W.2d at 86. Section 803.1(2) further provides: "If the body of a murder victim is found within the state, the death is presumed to have occurred within the state."

Here, because the body was found in Minnesota, this statutory provision is **not** applicable in this case to establish territorial jurisdiction in Iowa.

In *State v. Wedebrand,* 602 N.W.2d 186, 189 (Iowa Ct. App. 1999), a companion case to Astello's case, the victim was abducted and driven out to a rural Iowa location. *Id.* at 189. There, Defendants Ryan Wedebrand, Luis Lua, and others gagged and repeatedly beat the victim. *Id.* Although Juan Astello was reluctantly present during a portion of this episode, he did not participate in this "conduct." Wedebrand, Lua, and others (not Juan Astello) placed the victim in the truck of their car and then drove the victim to Minnesota. *Id.* Wedebrand, Lua, and the others took the victim to an abandoned farmstead in Minnesota where Wedebrand shot the victim in the hip and Lua fatally shot the victim in the head. *Id.*

During the above episode, at no time did Juan Astello plot, plan, or attempt to carry out the execution of Erickson. The trial testimony revealed that Lua initiated the murder while in Minnesota and that the 16 year old Astello tried to move away from the conduct of the others on several occasions. Astello could not leave as he was trapped in a remote area and needed a ride out but was afraid of the others because he had recently been severely beaten and put in the hospital where he suffered a coma. Further, Lua, when he pled guilty to his Federal charges, admitted in his

Acceptance of Responsibility statement that he took full and complete responsibility for the murder of Erickson

Wedebrand was charged with first-degree murder and first-degree kidnaping in the victim's death. *Id.* Ultimately, the jury found Wedebrand guilty of first-degree murder as an aider and abetter. *Id.* at 188.

On appeal, Wedebrand claimed that the victim was shot and died in Minnesota, and thus the State lacked territorial jurisdiction. *Id.* at 189. Wedebrand argued that the remaining elements of premeditated murder, malice aforethought, and specific intent to kill, were not predicate conduct implicating Iowa's jurisdiction under sections 803.1(1) and 803.1(2). *Id.* The Iowa appeals court disagreed and affirmed. Astello's case is distinguished from *Wedebrand* and analogous to *Serrato* because Astello's "acts and conduct" did not show the requisite intent or malice. Quite the contrary, he did not want any part of what he was experiencing. In fact, Astello did not want to be where he was, but could not escape for lack of a way to do so and for fear of retaliation from the others as he had recently been severely beaten and placed in the hospital. In essence, the State failed to present sufficient evidence to prove Astello had the specific intent to kill and malice aforethought in Iowa to invoke the State's territorial jurisdiction.

*Serrato* relied on *State v. Wagner*, 596 N.W.2d 83 (Iowa 1999), to suggest one's intent does not describe "conduct" as contemplated by section 803.1. On appeal, Wagner argued that none of the elements of the offense of escape, Iowa Code section 719.4 (1999), constituted conduct to subject him to Iowa's territorial

jurisdiction. *Id.* The court determined that the first element did not describe "'conduct,' as contemplated by section 803.1(2)" but rather described a "status." *Id.* *Wagner* is distinguishable from *Serrato* because *Wagner* did not address the question of whether the element of intent was "conduct" within the meaning of Section 803.1. Unlike one's status, proof of one's intent is inferred from conduct; one's status simply is.

Actual innocence attached to this case when the State of Iowa lost its jurisdiction. Iowa charged Astello under Iowa Code section 707.2(2), the felony murder code. This means that the murder was not premeditated and happened at the instant Lua pulled the trigger and killed Erickson. Iowa in its charging instrument failed to show specific intent to kill and malice aforethought in Iowa to invoke the State's territorial jurisdiction. In order to do so, Iowa would have had to charge Astello under Iowa Code section 707.2(1), the premeditated murder code. Iowa failed this crucial element of the crime which placed the murder in Minnesota's jurisdiction. Because the victim's body was found in another State other than Iowa, Iowa can only charge a lesser crime from the greater offense of the First Degree Kidnaping under Iowa Code section 710. Further, the murder charge slopped-over and prejudiced Astello in his other convictions.

Accordingly, the State failed to present sufficient evidence to prove Astello had the specific intent to kill and malice aforethought while he was in Iowa to invoke the State's territorial jurisdiction. Even the charging instrument reveals that Astello had no

specific intent to kill and malice aforethought while he was in Iowa.

In another companion case for the same crime, *State v. Castillo-Alvarez*, 776 N.W.2d 111, 2009 Iowa App. LEXIS 1760 (Iowa Ct. App., 2009), Defendant, Juan Humberto Castillo-Alvarez ("Castillo"), appealed from his convictions of murder in the second degree, kidnaping in the second degree, and conspiracy to commit a forcible felony following the kidnaping and death of Gregory "Sky" Erickson in June of 1997. Castillo raises a number of challenges to his convictions including a claim that the district court erred in overruling his motion to dismiss based on the State's failure to comply with its responsibility to guarantee his right to a speedy trial under the Sixth Amendment to the United States Constitution, Article one section ten of the Iowa Constitution, and provided for by the Iowa Rules of Criminal Procedure. The Iowa Appeals Court found that the State failed to meet its burden to show good cause for failing to comply with the speedy trial requirement and reversed on this issue and remanded to the district court to enter an order dismissing the case. The Iowa Supreme Court refused to review the dismissal of Castillo's conviction.

However, The Jackson County Attorney in Jackson County, Minnesota has now charged Castillo with second degree murder, kidnaping, and first and second degree assault in the death of Erickson. It is clear and obvious that Minnesota had jurisdiction in this case from the beginning and that Iowa should never have charged Astello because of its lack of jurisdiction.

Accordingly, the U. S. Court of Appeals for the Eighth Circuit erred in denying Astello's COA which should have issued and his convictions should have been **Reversed** and **Remanded** for **Dismissal**.

## III. In light of *Graham v. Florida*, 560 U. S. ____ (2010), Astello's judgment must be reversed and his case remanded for further proceedings.

On May 17, 2010, this Court decided *Graham v. Florida*, 560 U. S. ____ 2010, wherein it held that the Cruel and Unusual Punishment Clause of the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.[3]

In *Graham*, Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release

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[3] It is essential to note that on May 18, 2010, the Des Moines Register Newspaper ran an article from the Associated Press regarding the *Graham* decision. Within that article, Register staff writer Grant Schulte inserted a piece called "Effect on Iowa" wherein he lists seven (7) inmates which the ruling would have an effect on in Iowa. Included at the top of that list was Juan Astello.

except executive clemency. Graham challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed. This Court **reversed** and **remanded**. The holding in *Graham* is wholly analogous and consistent with the Iowa Supreme Court holdings in *Veal* and *Bruegger*.

In the case at bar, Petitioner Astello was 16-years old at the time of his crime. He was convicted of Kidnaping for which he received a life sentence. He was also convicted of second-degree murder for which he received a sentence of 50-years. As such, Astello's life sentence is in violation of *Graham, Veal* and *Bruegger*. Therefore, Astello's life sentence must be **reversed** and **remanded** for further proceedings.

## CONCLUSION

For all of the above and foregoing reasons, the petition for writ of certiorari should be granted. Astello's conviction and sentence should be **reversed** and **remanded**.

Respectfully submitted,

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# APPENDIX

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**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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No: 10-1378

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Juan Carlos Astello,
Plaintiff - Appellant

v.

John Fayram, Warden,
Defendant - Appellee

---

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City(5:09-cv-04052-DEO)

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**JUDGMENT**

Before WOLLMAN, BOWMAN, and LOKEN, Circuit Judges

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

April 21, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E.Gans

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws or treaties of the United States, Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: The trial court erred in finding sufficient evidence was presented to sustain a guilty verdict to kidnaping in the first degree for charge of kidnaping from Spencer, Iowa to Jackson County, Minnesota.

(a) Supporting facts (Do not argue or cite law., Just state the specific facts that support your claim):

Juan Astello asserts there was insufficient evidence resented in this case to sustain his conviction for kidnaping in the First Degree (or even the lesser offense of Kidnaping in the 3rd Degree) the State of Iowa, by trial information, charged Astello with the crime of kidnaping in the 1st Degree committed on or about the 5th day of June, 1997, at the city of Spencer, in Clay County, Iowa, and continuing in other locations; and as a result of the kidnaping, the person kidnaped suffered serious injury, or was intentionally subjected to torture (Trial information filed June 27, 1997; App. 1-4). The court instructed the jury that the State of Kowa must prove as an element for the conviction of Juan Astello for Kidnaping in the 1st Degree that on or about the 5th day of June, 1997, the Defendant aided and abetted in the confinement or removal of Gregory Sky Erickson from Spencer, Iowa, to Jackson County, Minnesota. There was no evidence inthis case that there was any plan to kidnap Gregory Erickson at the time various persons (including Astello) left Esterville, Iowa, and went to Spencer,

Iowa, to the Gregory Erickson (Tr. 831-833; App. 305-307). Further, there was no evidence in this case that any plan was developed at Eric Sebasta's apartment in Spencer, Iowa, to kidnap Gregory Erickson while these persons were awainting the arrival of Gregory Erickson and before Astello left Spencer, Iowa, and returned to Estherville, Iowa (Tr. 835-836; App. 309-310). Further, the evidence is uncontroverted that Juan Astello was not present when Gregory Erickson was beaten in Spencer, Iowa; and that Juan Astello was not present when Gregory Erickson left Spencer, Iowa, whether voluntarily or involuntarily, and came to Esterville, Iowa (Tr. 790-792, 833; Ap. 264-266, 307).

GROUND TWO: The trial court erred in finding sufficient evidence was presented that any element of murder charge was committed by defendant in the State of Iowa.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

The State of Iowa, by Trial Information, charged Juan Astello of the crime of Murder in the First Degree, committed on or about the 6th Cay of June, 1997, in the State of Iowa. The court instructed the jury in this case, at the request of the State of Iowa, with three ways in which the State may prove murder in the 1st Degree and one way in which to prove Murder in the 2nd Degree. The court further instructed the jury in this case, pursuant to Iowa Code § 803.1:

> A person is subject to prosecution in the State of Iowa for an offense only if the offense is committed either entirely in Iowa or partly in Iowa. An offense is committed partly in Iowa if any conduct which is an element of the offense, or any

> result which constitutes an element of offense, occurs within Iowa.
> The statement is proved beyond a reasonable doubt the offense was committed either in part or entirely in Iowa. If you find the State has not proved the offense charged were committed in part or wholly within the State of Iowa, you must find him not guilty of that charge.

GROUND THREE: The trial court erred in overruling (IN PART) defendant's motion to suppress defendant's statements to law enforcement officers and admitting said statement (TWO) in evidence against defendant.
(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):
The State of Iowa sought admission of three statements made by Juan Astello to law enforcement officers on June 15, 1997; June 18, 1997; and June 10, 1997 and Juan Astello moved to suppress all three statements. The court overruled Juan Astello's Motion regarding statements provided on June 15, 1997 and June 18, 1997; and suppressed the use of his June 19, 1997, statement. The trial court relied upon (omitted) and found that on June 15, 1997, the questioning of Juan Astello was not custodial; on June 18, 1997, even though investigators followed custodial procedure, again, the questioning of Juan Astello was not custodial; and therefore, said statements were admitted into evidence.
GROUND FOUR: Trial counsel provided ineffective assistance of counsel to defendant during pre-trial, trial and pot-trial procedures.
(a) Supporting facts (Do not argue or cite law., Just

state the specific facts that support your claim):
Trial counsel for Juan Astello provided ineffective assistance of counsel by: (1) failing to properly object or move in *limine* to preclude various hearsay testimony (where no foundation for exception to hearsay for co-conspirator testimony);(2) failure to properly object or move in *limine* to preclude various hearsay testimony (not related to conspiracy testimony); (3)failure to preclude, properly object or successfully move in *limine* to preclude various references to "gangs" or "gang related" activities/symbols and the participation of Juan Astello in the same; (4) failure to object or move in *limine* to preclude testimony outside "minute of testimony" regarding jamming of gun likelihood and manner of the same; (5) failure to provide notice of possible impeachment witness (William Barbee); (6) failure to move for dismissal for want of jurisdiction in the State of Iowa on charges of murder during and prior to trial; (7)failure to request territorial jurisdictional element be placed in marshaling instruction for murder charges; (8) failure to request instruction or additional language in existing instruction that testimony of one accomplice is not sufficient to corroborate testimony of any other accomplice; (9) failure to effectively communicate and assist Juan Astello in decision regarding plea offer from federal (and indirectly State) authorities; and (10) failure to obtain and present defense evidence.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**WESTERN DIVISION**

| | |
|---|---|
| JUAN CARLOS ASTELLO,<br>Petitioner,<br><br>v..<br><br>JOHN FAYRAM, Warden,<br>Respondent. | No. 09-CV-4052-DEO<br><br>**PRELIMINARY REVIEW OF PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254** |

Before the Court is Petitioner Juan Carlos Astello's petition for a writ of habeas corpus (Docket No. 1-1),application to proceed *in forma pauperis* (Docket No. 1), and application for appointment of counsel (Docket No. 2). As explained in further detail below, Astello's petition must be dismissed because it was not filed within the one-year period of limitations as provided in 28 U.S.C. § 2244(d)(1).

## I. BACKGROUND

Following his 1998 trial in the Iowa District Court in and for Kossuth County, a jury found Astello guilty of second degree murder, first-degree kidnaping, and conspiracy to commit a forcible felony for his participation in the kidnaping and fatal shooting of Gregory "Sky" Erickson. See State v. Astello, No.

FECR006374 (Kossuth County Dist. Ct. 1998).[1] On April 13, 1998, Astello was sentenced to an indeterminate 50-year term of imprisonment for second-degree murder and a life sentence without the possibility of parole for first-degree kidnaping. Id. The conspiracy count was dismissed. Id. Astello filed a notice of appeal on April 20, 1998. Id. His appeal was referred to the Iowa Court of Appeals.

The Iowa Court of Appeals affirmed Astello's convictions on August 27, 1999[2], and the Iowa Supreme Court denied his
application for further review. Procedendo issued on November 22, 1999.

On September 27, 2001, Astello applied for postconviction relief in the Kossuth County District Court. See Astello v. State, No. PCCV024292 (Kossuth County Dist. Ct. 2002). Following a hearing, the postconviction court rejected all of Astello's claims and denied his request for postconviction relief on November 26, 2002. Id. Astello appealed. On February 11, 2004, the Iowa Court of Appeals affirmed. See Astello v. State, 680 N.W.2d 378 (Iowa Court App.

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[1] Iowa state court criminal and civil records may be accessed at the following web address:http: //www.judicial.state.ia.us/Online_Court_services/. July 26, 2010 See Stutzka v. McCarville, 420 F.3d 757, 760 n.2 (8th Cir. 2005)(addressing court's ability to take judicial notice of public records).

[2] State v. Astello, 602 N.W.2d 190 (Iowa Ct. App. 1999).

2004). On May 28, 2004, the Iowa Supreme Court denied further review.

Astello again applied for postconviction relief on November 27, 2006. See Astello v. State, No. PCCV025276 (Kossuth County Dist. Ct. 2007), *appeal dismissed*, No. 07-1462 (Iowa 2008). On August 7, 2007, the Kossuth County District Court dismissed his petition for postconviction relief, and Astello appealed. Id. His appeal was dismissed as frivolous on August 22, 2008, and procedendo issued August 27, 2008. Id.

Astello filed the instant § 2254 petition, at the earliest, on June 23, 2009. Docket No. 1-1 at 23; see Nichols v. Bowersox, 172 F.3d 1068, 1077 (8th Cir. 1999) (extending application of prison mailbox rule to pro se § 2254 petitions), *overruled on other grounds by* Riddle v. Kemna, 523 F.3d 850 (8th Cir. 2008). In his petition, Astello argues (1) the evidence presented at his trial was insufficient to support his convictions for second-degree murder and first degree kidnaping; (2) the trial court erred in admitting his statements to law enforcement officers; (3) his conviction by an all-white jury violated his Sixth Amendment right to be tried by an impartial jury; (4) he was subjected to vindictive and malicious prosecution; and (5) his trial counsel was ineffective because she failed to object to certain testimony and evidence introduced by the State, failed to request or object to certain jury instructions, failed to adequately advise him during the plea bargaining stage and during trial, and failed to obtain and present defense evidence.[3] Docket No. 1-1 at 12-19.

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[3] To the extent Astello raises arguments in his § 2254 petition that were not presented to the Iowa Supreme Court, they are barred by 28 U.S.C. § 2254(b)(1)(A), which requires exhaustion of all federal claims in the appropriate state forum.

## II. DISCUSSION

### A. *Initial Review Standard*

Rule 4 of the Rules Governing Section 2254 Cases provides that the court shall conduct an initial review of the petition
for habeas corpus and summarily dismiss it, order a response, or "take such action as the judge deems appropriate." See Rule 4, Rules Governing Section 2254 Cases. The court may summarily dismiss an application without ordering a response if it plainly appears from the face of the application and its exhibits that the petitioner is not entitled to relief. See id.; 28 U.S.C. § 2243; Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993)(explaining that "Rule 4 enables the district court to dismiss a petition summarily, without reviewing the
record at all, if it determines that the petition and any attached exhibits either fail to state a claim or are factually frivolous," and "[e]ven if the petition clears those hurdles, the district court still need not independently review the record so long as the petitioner does not dispute that the facts reported in the state court opinions faithfully and accurately reflect the record." (citing Davis v. Franzen, 671 F.2d 1056, 1057 (7th Cir. 1982))); see also Barnett v. Roper, 541 F.3d 804, 807 (8th Cir. 2008) (district court may consider sua sponte the timeliness of a state prisoner's habeas petition (citing Day v. McDonough, 547 U.S. 198, 209 (2006))). For the reasons set forth below, summary dismissal is appropriate in this case.

## B. *28 U.S.C. § 2244(d)*

A petitioner has one year from the time a state court judgment becomes final to apply for a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1)(A). A judgment is final, for these purposes, at the conclusion of all direct criminal appeals in the state system followed by either (1) the denial of certiorari or (2) the expiration of the time allotted for filing a petition for a writ of certiorari. Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998). A petitioner has ninety days from the date of entry of judgment in a state court of last resort to petition the United States Supreme Court for a writ of certiorari. Sup. Ct. R. 13.

Astello's direct appeal was dismissed by the Iowa Court of Appeals on August 27, 1999, after which point the Iowa Supreme Court denied further review. Procedendo issued on November 22, 1999, thereby marking the conclusion of all direct criminal appeals in the state court system. Taking into account the ninety days he had to petition for certiorari, Astello's statute of limitations for filing a federal habeas claim began to run on February 21, 2000,[4] and expired on February 21, 2001.[5]

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[4] Ninety days after November 22, 1999, was actually February 20, 2000. However, February 20, 2000, was a Sunday, so the deadline for filing a petition for certiorari with the Supreme Court was Monday, February 21, 2000. See U.S. Sup. Ct. R. 30.1 (In calculating deadlines, "[t]he last day of the period shall be included, unless it is a Saturday, Sunday, [or] federal legal holiday . . . in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, [or] federal legal holiday.").

[5] For a visual representation of the relevant timeline in this case, see Attachment 1, "Habeas Timeline," on page 11.

Although Astello filed state postconviction relief applications, there was no statutory tolling of the statute of limitations because his first postconviction relief application was filed after the statute of limitations had already expired.[6] Astello first applied for state postconviction relief on September 27, 2001. Because the deadline for filing Astello's federal petition passed on February 21, 2001, his later filing for postconviction relief in state court cannot act to toll the federal statute of limitations. See Boston v. Weber, 525 F.3d 622, 624 (8th Cir. 2008) ("'[T]he time between the date that direct review of a conviction is completed and the date that an application for state post-conviction relief is filed counts against the one-year [limitations] period.'" (quoting Painter v. Iowa, 247 F.3d 1255, 1256 (8th Cir. 2001))).

Therefore, Astello's § 2254 petition is untimely unless the state imposed an impediment to the filing of a timely application,[7] or unless Astello is entitled to equitable tolling. In his petition, Astello does not attribute the delay in filing his federal habeas petition to any state created impediment. Therefore, the Court

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[6] See 8 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending should not be counted toward any period of limitation under this subsection.").

[7] See 28 U.S.C. § 2244(d)(1)(B) (if unconstitutional, state-created impediment prevents filing of federal habeas petition, then 1-year limitations period does not begin to run until that impediment is removed).

will consider only the question of whether Astello is entitled to equitable tolling. In that regard, § 2244(d) is a statute of limitations subject to equitable tolling where extraordinary circumstances beyond a prisoner's control make it impossible to file a timely petition and the extraordinary circumstances were the cause of the untimeliness. Earl v. Fabian, 556 F.3d 717, 722 (8th Cir. 2009) (citations omitted). "The burden of demonstrating grounds warranting equitable tolling rests with the petitioner." Id. (citation omitted). "The [application] of equitable [tolling] to relieve the strict application of [the] statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the r0ules of clearly drafted statutes." Id. (citation omitted). "Equitable tolling should only apply where the petitioner . . . has demonstrated diligence in pursuing the matter." United States v. Martin, 408 F.3d 1089, 1095 (8th Cir. 2005) (citation omitted).

In an effort to explain why this Court should construe his petition as timely filed, Astello contends that he was never informed by any of his several attorneys of the 1-year 9limitations period imposed by 28 U.S.C. § 2244(d). Docket No. 1-1 at 7, 18, 22. Astello further contends that "research difficulties" impeded his ability to comply with the statutory deadline. Docket No. 1-1 at 7-8, 19. Astello's contentions appear to be variations on the same theme – that he did not understand how the statute of limitations operated in his

case. Yet, even in the case of an unrepresented prisoner, ignorance of the law is not a basis for equitable tolling.

See Cross-Bey v. Gammon, 322 F.3d 1012, 1015 (8th

Cir. 2003)("'[E]ven in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.'"(quoting Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000))). Put differently, Astello's lack of understanding concerning the operation of the statute of limitations, while regrettable, does not amount to an extraordinary circumstance beyond his control.

## III. CONCLUSION

In sum, Astello did not file his § 2254 petition within the one-year period of limitation. Astello had until February 21, 2001, to file the instant petition. However, Astello did not file his § 2254 petition until June 23, 2009. Even excluding the time during which his two state PCR applications remained pending, Astello's § 2254 petition is still 1,425 days late.

**IT IS THEREFORE HEREBY ORDERED** that the Clerk of Court shall file the petition for purposes of making a record. Because it is clear that 28 U.S.C. § 2244(d)(1) bars Astello's action, his § 2254 petition shall be **DISMISSED** summarily under Rule 4 of the Rules Governing Section 2254 Cases.

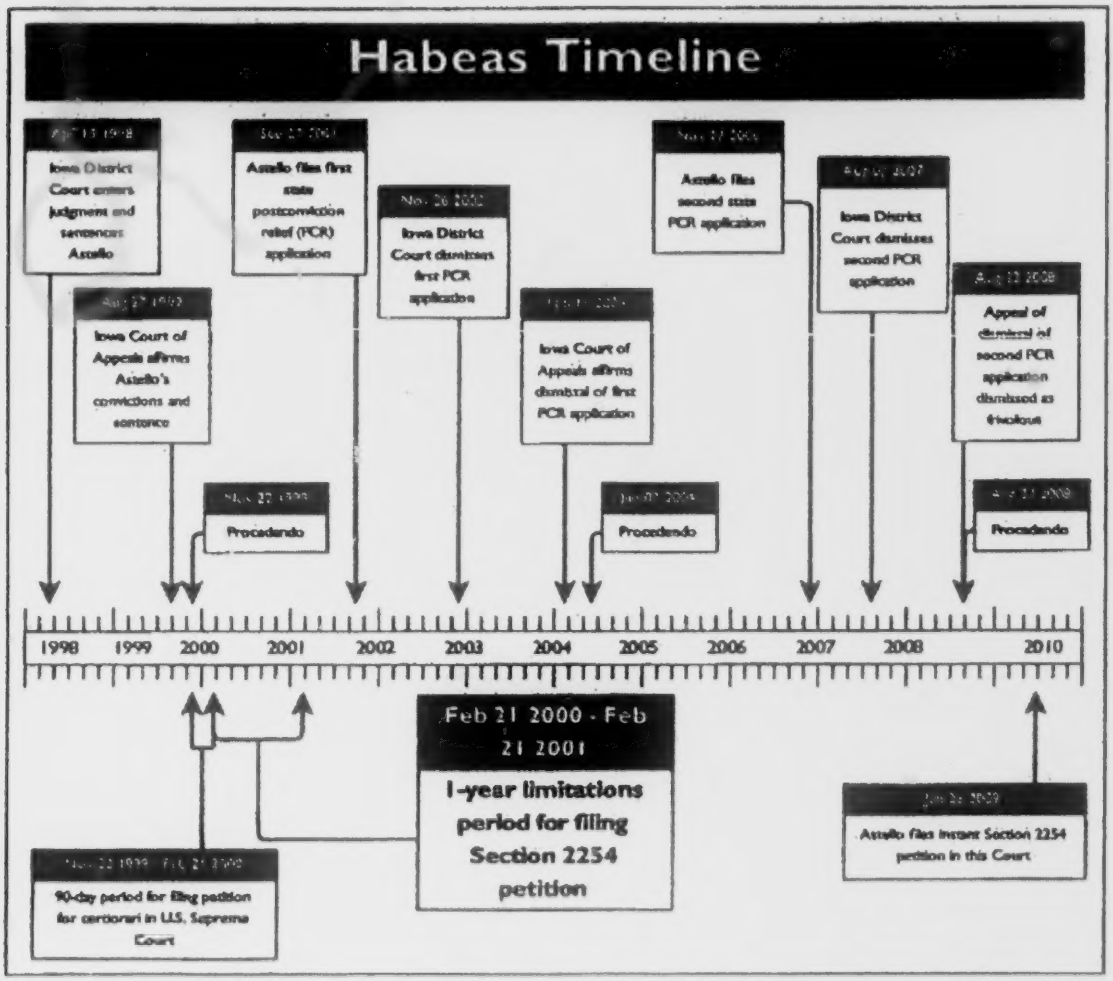
**IT IS FURTHER HEREBY ORDERED**, in light of such dismissal, moreover, Astello's application to proceed *in forma pauperis* (Docket No. 1) and application for appointment of counsel (Docket No. 2) shall both be **DENIED** as moot.

**IT IS SO ORDERED** this 12th day of January, 2010.

Donald E. O'Brien, Senior Judge

United States District Court
Northern District of Iowa

Attachment 1


Habeas Timeline
Iowa District Court enters judgment and sentences Astello
Astello files first state postconviction relief (PCR) application
Iowa District Court dismisses first PCR application
Astello files second state PCR application
Iowa District Court dismisses second PCR application
Appeal of dismissal of second PCR application dismissed as frivolous
Iowa Court of Appeals affirms Astello's convictions and sentence
Procedendo
Iowa Court of Appeals affirms dismissal of first PCR application
Procedendo
Procedendo
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2010
Feb 21 2000 - Feb 21 2001
1-year limitations period for filing Section 2254 petition
90-day period for filing petition for certiorari in U.S. Supreme Court
Astello files instant Section 2254 petition in this Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

| | | |
|---|---|---|
| JUAN CARLOS ASTELLO, | ) | |
| Petitioner, | ) | No. C09-4052-DEO |
| vs. | ) | |
| | ) | JUDGMENT |
| JOHN FAYRAM, Warden, | ) | IN A CIVIL CASE |
| Respondent. | ) | |

This action came before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 is denied.

Dated: January 13, 2010 ROBERT L. PHELPS
Clerk

/s/ des
(By) Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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No: 10-1378

---

Juan Carlos Astello

Plaintiff - Appellant

v.

John Fayram, Warden,

Defendant - Appellee

---

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City(5:09-cv-04052-DEO)

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**ORDER**

The petition for rehearing by the panel filed by the appellant is denied.

May 21, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans